No. 16090

United States
COURT OF APPEALS
for the Ninth Circuit

IN THE MATTER OF THE BANKRUPTCY OF

VINCENT HALLS DUNCAN and ROBERTA JEANNE DUNCAN, a marital community, dba V. H. DUNCAN CO.,

Bankrupt.

ORVAL D. MARKS,

Appellant,

-vs-

J. E. PINKHAM, Trustee in Bankrupcty,

and

HON. O. M. PITZEN, Referee in Bankruptcy,

Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

HON. GEORGE H. BOLDT, Judge.

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JURISDICTION OF THE DISTRICT COURT

The Jurisdiction of the District Court in this case is based on Clause 10 of Subdivision A of Sec. 2 of the Bankruptcy Act (11 USCA Sec. 11 (a) 10 (Tr. 2), the matter going up to the District Court on a Petition for Review of an Order made on or about March 13, 1958,

by the Hon. O. M. Pitzen, Referee in Bankruptcy, which order denied the Petition for Reclamation of a truck and trailer held by the Trustee of the estate of Vincent Halls Duncan, a bankrupt, said order being a "Final Order" within the meaning of Clause 10 of subdivision (a) of Section 2 of said Bankruptcy Act, and the Petitioner having appeared and participated in the hearing from which the order flowed and being a party "aggrieved" thereby.

JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Circuit Court of Appeals to review the Memorandum Decision and Order of the District Court Judge is based on Subdivision (a) of Sec. 24 of the Bankruptcy Act, 11 USCA, Sec. 47 (a) as amended by Amendatory Act of 1938, said Decision and Order being a "final order" appealable under the above statutes.

CONCISE STATEMENT OF THE CASE

This appeal involves validity of chattel mortgage as against Trustee in Bankruptcy, arising out of the following facts:

On or about Sept. 17, 1955, the truck and trailer here in question, was owned by Appellant, Orval D. Marks (Tr. 41), and was physically located in Multnomah County, Oregon, the place of residence of said Orval D. Marks (Tr. 42).

On or about said date, one Carl Duncan and Vincent H. Duncan, in the City of Portland, County of Multnomah, State of Oregon, purchased said truck and trailer from Orval D. Marks, executing all papers, simply as individuals (Tr. 42 and Ex. 1, Tr. 17 at 19 and 20). As part of the same transaction and as a security for payment of the price, Carl Duncan and Vincent H. Duncan jointly executed and delivered to Orval D. Marks a note secured by a chattel mortgage on said equipment and said chattel mortgage was duly recorded in Multnomah County, Oregon (Tr. 42, 17, 20 and 21).

The certificates of title to said equipment were on September 17, 1955, and have at all times since been registered only in the State of Oregon and still are, and the equipment bore Oregon license plates at all times to and including the present (Tr. 20 (a) and 21), no request or effort ever having been made by the Bankrupt to have title to the vehicles registered or have them licensed in the State of Washington (Tr. 96).

After the sale to the Duncans on or about Sept. 17, 1955, a lease was made between the Duncans and Pacific Truck Rentals, and the truck and trailer was used in interstate transportation between Oregon, Washington and California (Tr. 86 to 90 and Ex 4, Tr. 22; Tr. 106), but the terminal point and point of origin and "base of operations" remaining at all times here involved in Portland, Oregon (Tr. 86, 109).

About January, 1956, Carl Duncan and Vincent Duncan had a falling out and Carl endorsed the certificates of title (Tr. 102, 103; 144), at the request of Vin-

cent Duncan to enable Vincent Duncan to control operations but was never released from the mortgage (Tr. 57, 108, 104, 115). Vincent Duncan then cancelled the lease between Carl and Vincent Duncan and Pacific Truck Rentals and signed a new one with Pacific Truck Rentals, which latter company continued the same operation of the truck till about Sept. 30, 1956 (Tr. 156, 158). On or about said said date, by mutual consent, the latter lease between Vincent Duncan and Pacific Truck Rentals was cancelled (Tr. 158) and Vincent Duncan thereafter made several trip leases of the equipment to Western Produce Co., Portland, Oregon (Tr. 159, 128-133), and others in Portland, Oregon, who continued to use it in the same interstate hauls, and in part, Vincent Duncan operated it himself in the same hauls (Tr. 86, 88, 159).

From and after Sept. 30, 1956, until bankruptcy intervened, about Sept. 24, 1957, Vincent Duncan, when the truck was not in use or at the end of runs when he was in this area, drove the truck to his home in Tacoma and there parked it (Tr. 86, 87).

Vincent Duncan, the bankrupt, on Sept. 17, 1955, and at all times since, resided only in Tacoma, Washington (Tr. 79); Carl Duncan residing in Oregon (Tr. 56). Appellant Marks claims his mortgage is a superior lien and being in default at the time of bankruptcy, he is entitled to possession for foreclosure. The Trustee contends the mortgage is invalid as to him, never having been recorded in Washington.

At no time from Sept. 1955, till receipt of Notice

of First meeting of Creditors, did Orval D. Marks know that the truck and trailer were "removed" from Oregon to Washington, and he never agreed or consented to such "removal," if in fact there was such a "removal" (Tr. 105 to 109, 49).

CONTENTIONS OF APPELLEES

The Trustee contends that after Sept. 30, 1956, when the second lease (Tr. 158, 159, 132, Ex. 9, Tr. 28), between Vincent Duncan and Pacific Truck Rentals was cancelled and Vincent took possession and operated personally or trip leased to others, the truck and trailer were "removed" from Oregon to Washington, apparently because that was the state of domicil and residence of Vincent Duncan, and contends that under R. C. W. 61.04.090 there has been a "removal" from one county to another county and the lien of Appellant's mortgage has been lost by failure to record the mortgage in the "county" to which "removed."

While it is not absolutely clear, it would seem that the Trustee contended and the Referee found the fact to be that the above statute relates not only to chattels originally located in one county in Washington and mortgaged in that county of Washington, then removed to another county of Washington; but that it is broad enough to cover a situation involving equipment located in another state when originally mortgaged and later brought into the State of Washington.

CONTENTIONS OF APPELLANT

1. That the chattel mortgage given in Oregon on property then located in Oregon and duly recorded in Oregon is universally recognized as valid and superior to subsequent liens, even if the property were subsequently "removed" to the State of Washington.

2. That if it were in fact "removed" such removal was without the knowledge or consent of Appellant and hence the lien is not lost by failure to rerecord.

3. That the recording acts of Washington, R. C. W. 61.04.090 ff relate solely to property originally located in Washington and moved from one county of Washington to another county of Washington, and have no bearing on property originally located out of state and mortgaged out of state before being brought into the State of Washington.

4. That in fact there was no "removal" as that term is understood in the cases.

SPECIFICATION OF ERRORS

(1) The District Court erred in denying Petition for Reclamation.

(2) The District Court erred in holding that R. C. W. 61.040.070 and 61.040.090 applied to this case.

(3) The trial court erred in holding that the equipment had been "removed" to Washington.

(4) The District Court erred in holding, if there was

a "removal" that Appellant had knowledge of such removal or consented thereto, or failed to assert his rights under his mortgage within a reasonable time after such removal.

ARGUMENT

The primary question involved here is whether or not an admittedly valid chattel mortgage given in Oregon on equipment then located in Oregon and recorded in Oregon, said equipment used in interstate commerce from Portland, Oregon, as a base of operation and terminal point of trips, with only occasional and transient trips to Washington, is superior to the interest of the Trustee in Bankruptcy for the mortgagor-bankrupt, or if the mortgage lien has been lost under R. C. W. 61.04.090 because of an alleged "removal."

The law is quite clear:

1. ORIGINAL VALIDITY OF A CHATTEL MORTGAGE IS DETERMINED BY LAW OF SITUS.

"(a) The original validity of a chattel mortgage as a lien on personal property of a bankrupt is governed by the law of the state where the property is located at the time the mortgage is executed and rcorded." Clark v. Kramer, 67 ALR 1456; 10 Am. Jur., Pg. 733; 13 ALR 2d 1312 ff.

(b) It is well settled that validity of a chattel mortgage depends not upon the law of the domicil of the owner, but upon the law of the country where the transfer takes place. 57 ALR 702, 704; 13 ALR 2d 1312 ff.

(c) The priority of a chattel mortgage lien over interests subsequently acquired by third parties is to be determined by the law of the place where the property is situated at the time the mortgage is executed. See In Re Nuckols, 201 F. 437 and 57 ALR 702, 710; 13 ALR 2d 1312 ff.

(d) The validity of a chattel mortgage is governed by the law of the place where the chattel is situated when the chattel mortgage is made and not by the law of the place where the parties resided. 57 ALR 702; 13 ALR 2d 1312 ff.

(e) *Filing or recording of a chattel mortgage in the state where mortgagor resides at the time of execution is not necessary to protect the lien of the mortgage as against the Trustee in bankruptcy* when the mortgage is recorded in the state where the mortgage was executed and where the property was located at the time. See In Re: Green 134 F. 137.

2. THE RECORDING ACTS OF THE STATE OF WASHINGTON DO NOT REQUIRE RE-RECORDING IN WASHINGTON OF A CHATTEL MORTGAGE ON PERSONALTY ORIGINALLY LOCATED AND MORTGAGED OUT OF STATE AND LATER BROUGHT INTO WASHINGTON.

Washington Decisions Advance Sheets, Vol. 150, No. 11, Pg. 307 ff.

3. IF IN FACT THE TRUCK AND TRAILER HAVE BEEN "REMOVED" FROM OREGON TO WASHINGTON (THIS BEING DENIED BY APPELLANT), THEN THE QUESTION OF THE VALIDITY OF THE MORTGAGE AND ITS PRIORITY AS AGAINST THE TRUSTEE IN BANKUPTCY IS TO BE DETERMINED BY THE SUPREME COURT OF THE STATE IN WHICH THE BANKRUPTCY COURT SITS.

See 6 Am. Jur., Pg. 1121 and Straton v. New, 283 US 318.

The Washington Supreme Court, in its most recent pronouncement and which it reviewed all its former decisions on this point of "removal" (Vol. 150, No. 11, Pg. 307 ff of Washington Decision Advance Sheets), held:

(1) There is no requirement under Washington recording statutes, to record in Washington in order to preserve the validity of the lien of a chattel mortgage executed in another state on a chattel subsequently "removed" to Washington, and

(2) As a matter of public policy that a chattel mortgage executed in Oregon and recorded in Oregon on a chattel located in Oregon, is valid and is superior to the lien of an attaching creditor in Washington, after the chattel is "removed" to Washington, provided only that (a) the removal was without the knowledge or consent of the mortgagee, and (b) that the mortgage acts promptly to protect its rights upon discovery of the removal.

Here the facts are almost uncontested that the "removal," if in fact there was one, was done without the knowledge or consent of the mortgagee. The mortgagee unequivocally so testified (Tr. 49, 105 to 109), and the bankrupt admits he never advised appellant of any change in operations (Tr. 92, 160, 89, 90). The only other evidence from the bankrupt was that (a) his address had at all times been Tacoma, Washington; (b) that he parked the truck at his home occasionally, and

(c) that the checks he used to pay mortgagee showed his home address. See also Tr. 86 to 90. At no point in the record can there be found even a scintilla of evidence that bankrupt advised mortgagee of any "removal" or that mortgagee had any knowledge of or gave his consent to any "removal."

Appellant contends that if there was a removal, then on the facts, having no knowledge and having given no consent, on the strength of the prounouncements of the Washington Supreme Court, mortgagee Appellant should prevail.

4. APPELLANT CONTENDS AND URGES MOST STRENUOUSLY THAT THERE HAS BEEN NO "REMOVAL" OF THE TRUCK AND TRAILER FROM OREGON TO WASHINGTON.

The truck was located in Oregon in Sept. 1955 and was there sold to the Bankrupt who gave his note and chattel mortgage back to seller for part of the price. This entire transaction occurred in Oregon, including recording of the chattel mortgage in Oregon.

The Mortgagor-Bankrupt was at that time and at all times since a bona fide resident and inhabitant of Tacoma, Washington, no change of any kind having occurred and the other mortgagor lived in Oregon.

The truck and trailer was at all times licensed in Oregon, the Bankrupt making no move whatever to secure licensing or certificate of ownership in Washington.

The truck and trailer was originally and at all times from date of sale and execution of the mortgage engaged in interstate commerce from Portland as a base of operations.

The cases are clear that use of a vehicle in interstate commerce does not constitute a "removal" to the other states in which the vehicle operates.

Thus the term "removal" is defined as "one of a permanent rather than a transitory nature." See 13 ALR 2d, 1312 at 1335 ff and Vervais v. Egan, 226 Ill. App. 500; Applewhite v. Ethridge, 187 S. E. 588, 210 N. C. 433 and Bankers Finance v. Locke, 170 Tenn. 28, 91 S. W. 2d 297, wherein it was pointed out that "removal" as used in connection with the rule relative to effect of the mortgagees consent to the removal, had a connotation of permanence as distinguished from a temporary or transient removal, and that where there was no permanent removal of the property, the fact that the automobile has been temporarily brought into the state for transient use, with consent of the mortgagee, would not subordinate the lien of the mortgagee to the claim of the local attaching creditors.

> "A mortgage validly executed and legally recorded in another state where the property was situated, is entitled to priority over lien of a resident attaching creditor of the mortgagor, notwithstanding mortgage holder's knowledge that the automobile was being used in making regular trips into another state." Bankers Finance v. Locke, 91 S. W. 2d 297, 170 Tenn. 28.

> "Where a vehicle mortgage is recorded in one state occasional trips across the state line to a neighboring town do not constitute a removal to the other state requiring recording there." Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

If the ruling by the Referee, as upheld by the District Court Judge of Review were carried to its

ultimate it would be necessary in every instance to record the chattel mortgage in every state of union and in all the territories and possessions.

Considerable weight must be given, in determining "removal" to the fact that absolutely no effort was ever made to have title to the truck and trailer reissued in Washington, and no effort made to license the equipment there. The titles were and still are Oregon titles and the license plates Oregon plates. Had there been a "removal" to Washington there most certainly would have had to be new certificates of title and licenses issued by the State of Washington.

The pertinent Statutes of Washington State are set forth as follows:

R. C. W. 46.12.010 ff requires a "certificate of ownership" be obtained before a license can be issued and prohibits driving a motor vehicle without a certificate of ownership.

R. C. W. 46.12.030 requires filing of an application showing, among other things, the nature of the applicant's interest and *all encumbrances* and certificate is issued to legal owner and registration only to registered owner, unless same person is both.

R. C. W. 46.16.010 prohibits driving of any motor vehicle in Washington without license, but 46.16.030 exempts non-residents whose vehicle is duly licensed elsewhere on a reciprocal basis," and

R. C. W. 46.16.160 provides "Any commercial vehicle licensed in another state or territory and not

licensed in this state and which under reciprocal relations with that state would be required to obtain a license in this state, may in lieu of a certificate of ownership and license registration *obtain a permit."*

It is thus clearly evident that had there been a "removal" by the bankrupt to Washington of this equipment, he would have been required to apply for a "certificate of ownership" and a license and would have had to disclose, in his application for certificate of ownership the mortgagee's interest and the certificate of ownership would have been issued to the legal owner and mortgagee.

In this case, the mortgagor simply obtained a "permit" under 46.16.160 and it is evident by his conduct that there was no removal.

In conclusion, the cases and record are clear beyond even a shadow of doubt that the lien of the chattel mortgage is superior to the interest of the Trustee, the Mortgagor (Appellant) having no knowledge of or having given no consent to "removal" and that there was no "removal" at all.

CONCLUSION

The Referee and the District Court Judge both found that since the bankrupt had resided in Washington for over a year before bankruptcy intervened and that the mortgagee knew of such residence and hence there had been a "removal" of the truck and trailer from Oregon to Washington, as the term "removal" is used in R. C. W. 61.04.090.

Here the mortgagor (bankrupt) was a bona fide resident of Tacoma, Washington and domiciled there when he gave the mortgage and he continued to maintain his residence and domicil in Tacoma at all times thereafter until bankruptcy intervened. No change of residence or domicil ever occurred during those times.

If the court can find and hold that there was a "removal" because the mortgagor's (bankrupt's) domicil was in Tacoma for one year approximately before bankruptcy, then it is only reasonable and logical to say he mortgage should have been recorded in Washington the very moment the mortgage was executed, because at that moment the mortgagor (bankrupt) resided in Tacoma and intended to continue to do so, and in fact did so, and all of this was fully known at that time to the mortgagee.

Such conclusion is completely contrary to all the cases herein cited which clearly hold that the validity of the mortgage and the recording requirements are to be determined by the laws of Oregon where the deal was made and the equipment was then located.

Actually, the case is quite simple. The truck and trailer were, in September of 1955, located in Oregon; the deal was made in Oregon and the mortgage recorded in Oregon and the titles were issued in Oregon, as well as the licenses, and the equipment continued to carry Oregon titles and licenses. The truck was used in interstate commerce in Oregon, California and a bit in Washington, but primarily was in Washington only infrequently, when parked by the mortgagor at his home at

the end of runs or when not in use. The trips into Washington were occasional and transient, rather than being taken there permanently. The bankrupt resided in Washington at all times here involved. Mortgagee never knew whereabouts of the truck and never consented to its "removal" and acted at once to recover possession when notified of the bankruptcy, as the bankrupt was then delinquent in a large amount on the mortgage.

Attention is drawn to the unnumbered exhibit called "Partnership Agreement" (Tr. 36). Careful analysis shows principal place of business of the two Duncans as Portland, Oregon. It further provides that it is a preliminary agreement only; an agreement to form a parnership; to be followed later by a formal partnership agreement within 180 days and if final agreement is not made within the time stated, the preliminary agreement was to terminate and *Carl Duncan* was to be sole owner of the business and equipment and Vincent Duncan (the bankrupt) was to be a mere *creditor* of Carl and have lien on the equipment for $2,000 Vincent advanced as down payment. No final partnership agreement was ever signed (Tr. 147) and Marks (the appellant) never released Carl Duncan from liability on the joint note and mortgage. It is clear from this agreement and the admitted facts, that Vincent Duncan never had title, hence the trustee acquired none. Vincent, and the trustee, were mere creditors of Carl.

Under the law as cited as the facts as admitted, it is clear beyond any reasonable doubt: (1) that there was no "removal," hence no need to record in order to

protect the lien of the Oregon mortgage as against the Trustee; (2) that if there was a "removal," it was without the knowledge or consent of the mortgagee, and he did act promptly to protect his rights under the delinquent mortgage upon discovery of the alleged "removal"; (3) that the trial court is manifestly in error in holding that R. C. W. 61.04.090 governs this situation, since the trial judge is bound by decisions of the Washington Supreme Court and that court has held specifically that the Washington recording acts do not apply to equipment originally located and mortgaged out of the state of Washington and later brought into Washington; and (4) the trial court erred in denying Petition for Reclamation and this court should now correct the errors and order immediate return of the chattels to the mortgagee.

Respectfully submitted,

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